IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.2515 OF 1989

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

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MEHBOOBKHAN HEIDERKHAN PATHAN
VERSUS
DIVISIONAL CONTROLLER, S.T., SURAT

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Appearance:
MR MS MANSURI for the Petitioners
None present for the Respondents

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Coram: S.K. Keshote,J
Date of decision:5.5.97

C.A.V. JUDGMENT

Heard learned counsel for the petitioners and

perused the Special Civil Application.

2. The facts of the case, emerging from the Special Civil Application, are that the petitioner No.1 has joined the services of the respondent-Corporation during the year 1968 as a reliever watchman and performed his duties satisfactorily and efficiently at Rajpipla depot. The petitioner No.1 has completed on the post, 14 years of service. He has completed 240 days of service in most of the years, particularly, in the year 1970-71. During the year 1981-82 also, the petitioner No.1 has completed 240 days' of service. The respondent-Corporation has taken a step for filling up vacancies of watchmen and the petitioner No.1 applied for the same. He was called for personal interview on 21st August 1981 before the Divisional Selection Committee. The petitioner No.1 was not selected and he was intimated this fact under the letter which was admittedly received by the petitioner No.1 on 2.9.81. The petitioner No.1's services were discontinued with effect from 4.9.82. The petitioner No.1 objected that action of respondent but he was informed under the letter dated 9.11.82 that he was appointed on temporary basis as "off day reliever watchman" and as he was not having required qualifications as per the rules of the Corporation, he was not taken in the employment. The petitioner No.1 approached this Court by filing Special Civil Application No.5230 of 1982. That Special Civil Application came to be dismissed by this Court on 18th April 1983 as withdrawn. It appears from the Special Civil Application that the petitioners have also raised Industrial Dispute in connection with the termination of services of petitioner No.1 and reference to the dispute has been made by the Government to the Labour Court under its Notification dated 11.4.83. It also appears from the order of this Court that the Corporation has given out that the petitioner will be assigned duties as "off day reliever watchman" in case any occasion arises for assigning such duty. The petitioner has withdrawn the Special Civil Application and that withdrawal was subject to "without prejudice to his right to get redress of his other grievances by taking appropriate proceedings in the proper forum under the provisions of the Industrial Disputes Act". The petitioners put appearance in the reference before the Labour Court at Vadodara and the same came to be rejected under the order dated 27th September 1988. The petitioner challenges that award of the Labour Court at Vadodara by this Special Civil Application.

3. The learned counsel for the petitioners, Shri

Mansuri, contended that the Labour Court has committed serious illegality in holding that in the present case, the respondent-Corporation has not violated the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as the `Act 1947') while terminating the services of the petitioner No.1. The learned counsel for the petitioners further contended that there is a fallacy in the approach of the Labour Court that only where the workman completes 240 days in twelve calendar months preceding the date of termination, only then compliance of provisions of Section 25F of the Act 1947 has to be made. The petitioner No.1 has long services and if in any year, earlier to twelve calendar months preceding the date of termination of his services, if he has completed 240 days in a year, then compliance of provisions of Section 25F of the Act 1947 has to be made. In support of this contention, the learned counsel for the petitioners placed reliance on the decision of this Court in the case of Sarabhai Chemicals v. Subhas N. Pandya, reported in 1984(II) LLJ 75. It has next been contended that the Corporation has employed more than 100 employees and as such, the provisions of Section 25N of the Act 1947 are applicable to it, and those provisions have not been complied with in the present case while terminating the services of petitioner No.1. Lastly, the learned counsel for the petitioners contended that the Corporation be directed to give the petitioners, equal pay for equal work, and thereby similar wages compared to other regular watchmen be given.

4. The respondent has also not filed any reply to the Special Civil Application. The petitioner filed additional affidavit before this Court which is dated 20th July 1989. In the said additional affidavit, the petitioner No.1 stated that in a preceding year of his termination in the year 1981, he had worked for a period exceeding 240 days. Further statement has been made by petitioner No.1 that he has been re-employed as "off day reliever watchmen" with effect from 15.6.82 in view of the understanding given before this Court by the Corporation in the Special Civil Application No.5230 of 1982 and thereafter also in the year 1983, and upto 1988 and during all these years, he had worked beyond 240 days in a year. The learned counsel for the petitioners, during the course of arguments, filed another additional affidavit of petitioners No.1, which is dated 17th March 1990, and a document annexure `AA', a zerox copy. However, nothing more has been stated by the petitioner No.1 in this additional affidavit than what he has stated in his earlier additional affidavit. The only change is that in earlier affidavit, he has given out the facts

upto year 1988, whereas in this affidavit, he has given out the facts upto 1989.

5. The learned counsel for the petitioners does not dispute that by this time, the petitioner No.1 would have attained the age of superannuation. Otherwise also, from the affidavit filed by the petitioner No.1, dated 20th July 1989, I found that his age was 53 years at the relevant time. Taking the age of superannuation to be 60 years, on which there is no dispute, the petitioner No.1 by now would have attained the age of superannuation. From the facts which have come on record, it is apparent that the petitioner No.1 was taken only as reliever watchman. That means that he was not given regular and permanent employment. However, the petitioner No.1 was given opportunity for regular employment in the services of the Corporation. He was called for interview on 21st August 1981 before the Divisional Selection Committee, but was not selected. The petitioner No.1 was intimated of this fact admittedly by the Corporation under its letter which has been received by him on 2.9.81. The option was then open to the Corporation, on non selection of petitioner No.1 in regular employment, not to give him any work of watchman as and when any regular watchman goes on leave, which precisely has been done in the present case by the Corporation by not giving the petitioner No.1 any work from 4.9.82. The petitioner No.1 filed Special Civil Application before this Court against the action of the Corporation to discontinue him as reliever watchman, by filing Special Civil Application No.5230 of 1982. The petitioner No.1 has not produced pleadings of that Special Civil Application filed before this Court, but from the order of this Court, it is clear that the grievance has been made against discontinuation of the petitioner No.1 as reliever watchman. Further fact which is apparent from the record is that the petitioners have also raised an industrial dispute in the matter. This conduct of petitioners of availing two remedies simultaneously in the matter deserves to be deprecated. Though truly speaking the petitioner No.1 was not having two remedies, but still if we go by the wider view that in a given case, the Court may exercise its extra ordinary powers conferred under Article 226 of the Constitution of India, then too, the petitioner No.1 should have stick to one remedy and should not have simultaneously ride on two horses. From the order dated 18th April 1983 of this Court, it appears that none of the parties have brought to the notice of this Court the fact that the petitioners have already raised industrial dispute and the dispute has also been referred to the Labour Court for adjudication. The petitioner No.1 has

not withdrawn the Special Civil Application No.5230 of 1982 on the ground that the dispute raised by him has been referred to the Labour Court by the Government for adjudication. The reason for withdrawal is apparent from the order dated 18th April 1983. The Corporation has stated before the Court that without prejudice to the rights and contentions of the parties, the respondent-Corporation will assign duties to the petitioner No.1 as an off day reliever watchman in case any occasion arises for assigning such duty. In view of the aforesaid statement made by the Corporation, the petitioner No.1 has withdrawn the Special Civil Application without prejudice to his right to get redress to his other grievances by taking appropriate proceedings in the proper forum under the provisions of the Industrial Disputes Act. So the petitioner No.1 has accepted the status of an off day reliever watchman. However, the reference was regarding the validity, correctness, and propriety of the action of the respondent to discontinue petitioner No.1 as a reliever watchman and the Labour Court, under the impugned award, decided that the Corporation has not violated, while dispensing services of the petitioner No.1 as reliever watchman, the provisions of Section 25F of the Act 1947. The petitioner No.1, for all these years continued as an off day reliever watchman in the Corporation till he attained the age of superannuation. He could not get himself in regular employment as he was not selected by the Selection Committee. This Court, in the case of Sarabhai Chemicals v. Subhas N. Pandya (supra), held that a Badli Worker is a workman under Section 2(s) of the Act 1947 and retrenchment of Badli Worker will attract Section 25F of the Act 1947. The question before this Court was whether a Badli Worker is a workman and whether the provisions of Section 25F will be attracted when such Badli Worker is retrenched. However, in para 3 of the judgment, a fact has been noticed that the workman therein worked for 251 days in the year 1973 and he was discharged on 15th November 1979. On the basis of this fact, the Court has held that it would be sufficient to bring him within the scope of Section 25F read with Section 25B of the Act 1947. In the present case, there is a finding of fact recorded by the Labour Court that in the year 1979, the petitioner No.1 has worked for 240 days and further averment made by the petitioner No.1 in additional affidavit that in the year 1981, he has worked for a period of more than 240 days had not been controverted by respondent. In these circumstances, even if retrenchment of petitioner No.1 is taken to be in violation of Section 25F of the Act 1947, relief of reinstatement cannot be granted for the reasons; (i) he

would have already attained the age of superannuation, (ii) he was not selected for regular employment, and (iii) for all these years, he worked as an off day reliever watchman. In view of this fact, the matter does not require elaborate consideration nor I consider it to be a case where the matter should be sent back to the Labour Court. At the most, the petitioner No.1 can be given compensation. Section 25F of the Act 1947 puts twofold obligations on the employer, if it desires to retrench its employee who had completed 240 days in twelve calendar months with it. The first obligation is to give him one month's notice or one month's salary in lieu of the notice and the second is to pay to the concerned workman, retrenchment compensation. How that calculation has to be made has been provided in the aforesaid section.

6. Admittedly, the petitioner No.1 was only a reliever watchman and in that capacity he would not have and could not have got the work on all the days. The very nomenclature of a reliever watchman gives out that he will get the work only when the regular watchman has gone on leave or for some other reason he is not available, and not otherwise. In such case, the determination of retrenchment compensation may become difficult. However, if we go by the facts of the case as pleaded by the petitioners, it is clear that the petitioner No.1 was continued with the Corporation as an reliever watchman for the period from 1968 to 4th September 1982. So that period comes to about 14 years. In the case of nature where the petitioner No.1 would not have got work for all 365 days in a year, a reasonable and appropriate approach is to take out his 240 working days in a year and then on the basis of that, 15 days' wages may be taken. This 15 day's wages calculated should be multiplied by 14 and the amount which comes should be given to the petitioner No.1 as one component of compensation. The second component for giving compensation will be the notice pay of one month and in calculation thereof, there may not be any difficulty. The third component may be the reasonable sum of illegal retrenchment. I consider it to be appropriate that for this purpose, wages for three years should be awarded. These wages of three years are to be calculated on the basis of 240 day's working of the petitioner No.1 in a year.

7. So far as the next contention of the counsel for the petitioners that the provisions of Section 25N of the Act, 1947 are applicable to the respondent-establishment is concerned, it is suffice to say that, this contention

is of no substance. The petitioner No.1 has not raised this point before the Labour Court and it is a case where it can be reasonably inferred that this point has been waived or was not considered to be of any substance by the petitioner No.1. This matter can be viewed from different angle also. It is a mixed question of law and fact whether the provisions of Section 25N of the Act, 1947, are applicable or not in the present case. The issue has to be raised and thereafter, the evidence has to be produced to prove that fact of the applicability and then the Labour Court could have considered the implications thereof. That has not been done in the present case. The last submission of the counsel for the petitioners is also equally devoid of any substance. The petitioner No.1 was not in a regular employment, but he was only a reliever watchman or he would have been paid the wages for the day on which the work has been taken from his as a watchman. The petitioner No.1 was given an opportunity to come in the regular employment of the respondent, but though he applied for the post, the Selection Committee has not found him suitable. The petitioner No.1 has a right of consideration for regular employment, which has not been denied to him. So the claim of the petitioner No.1 for all the benefits which are given to the regular watchman on the doctrine of `equal pay for equal work' cannot be accepted. If the matter is considered in different context, then too this claim cannot be granted. The claim of equal pay for equal work cannot be accepted merely on the claim made by the petitioner No.1. For the entitlement of the doctrine, of `equal pay for equal work', the petitioner No.1 has to establish as a fact that he is discharging all the duties and functions of a regular watchman and that he possesses all the requisite qualifications for the post, and above that, both the reliever watchman and the regular watchman stand on same footing in all other respects. The petitioner No.1, as a reliever watchman, cannot be given all those benefits which are being received by the regular watchman. He belongs to a distinct and different class, and as such, leaving apart the fact that the petitioner No.1 has failed to establish that the duties and functions of the reliever watchman and regular watchman are similar and identical, otherwise also, this claim is not sustainable.

8. In the result, this writ petition is disposed of with directions to the respondent to pay to the petitioner No.1, the amount to be calculated and arrived at on the basis of above formulae given by this Court in the judgment. The compensation and one month wages as well as damages for reinstatement have to be calculated

as per above formulae. The calculation of the amount should be made by respondent within a period of three months from the date of receipt of certified copy of this order and a draft of that calculation should be sent to the petitioner No.1 by registered post. The petitioner No.1 thereafter will send his approval to the draft calculation, and if he feels that there is some error in it, then he shall point out the same and shall return the draft calculation to the respondent within a period of fifteen days thereafter. In case of approval of draft calculation by the petitioner No.1, the respondent shall make payment of the amount to the petitioner No.1 within a period of one month next. Where there is any objection raised by the petitioner No.1 to the draft calculation, the respondent shall consider the same and shall thereafter make the payment of the amount to the petitioner No.1, within a period of two months next. All these calculations have to be made by respondent by taking wages last drawn by petitioner No.1 as a base. Rule made absolute in aforesaid terms with no order as to costs.

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